

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Office of General Counsel

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6 April 1984

NOTE FOR THE DIRECTOR

6 APR 1984 *rec'd 10 April*

Bill:

Here is the information you requested today on the Logan Act.



Stanley Sporkin
General Counsel

Attachments



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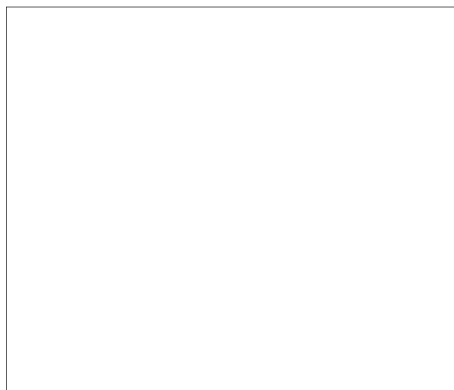
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Central Intelligence Agency
Washington, D.C. 20505

15 April 1986

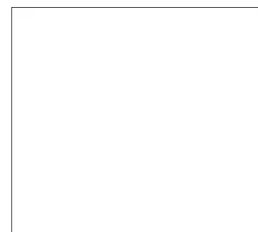
Executive Secretariat

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OKC

*Attached per our
conversation. Good luck.*



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18 USCS § 952**CRIMES****§ 952. Diplomatic codes and correspondence**

Whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, or which purports to have been prepared in any such code, and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 743.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Prior law and revision:**

This section is based on Act June 10, 1933, ch 57, 48 Stat. 122 (former 22 U.S.C. § 135).

Minor changes in phraseology were made.

CROSS REFERENCES

United States defined, 18 USCS § 5.

Foreign government defined, 18 USCS § 11.

Disclosure of classified information, 18 USCS § 798.

Communication of classified information by officer or employee of United States to foreign government, 50 USCS § 783.

RESEARCH GUIDE**Law Review Articles:**

Edgar and Schmidt, The Espionage Statutes and Publication of Defense Information. 73 Columbia L Rev 929.

§ 953. Private correspondence with foreign governments

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

(June 25, 1948, ch 645, § 1, 62 Stat. 744.)

Art. 1, § 4

CONSTITUTION

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two

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June 1977

thirds of that House, it shall be a Law. If he return it, the Votes of both Houses shall be taken, and if two thirds of the Names of the Persons voting shall be in favour, it shall be entered on the Journal of each House, and after it shall have been presented to the President in like Manner as if he had signed it, it shall have the same Force and Effect, and no Journal or Proceedings shall prevent its Return.

Every Order, Resolution, or Vote to which the Senate and House of Representatives shall have concurred, shall be a question of Adjournment of the United States; and before it shall be approved by him, or being approved by him, or being approved by two thirds of the Senate and House of Representatives, the Rules and Limitations of the United States shall be observed.

Section. 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to regulate Commerce with foreign Nations, to provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and with the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, on the subject of Bankruptcies and Insolvency;

To coin Money, regulate the Value thereof, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Robberies on Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Discipline of the naval Forces;

To make Rules for the Government and Discipline of the land Forces;

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9 April 1984

NOTE FOR: General Counsel

FROM:

Chief, Litigation & Legislation Division

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SUBJECT: The Logan Act

Stan:

Attached is some background material on the Logan Act. Speaking strictly in the abstract (because I have not seen the letter which gave rise to the Director's question), I think that two broad generalizations can be made.

- The legislative history of the Logan Act indicates strongly that it was designed to protect the prerogatives of the Executive Branch. It probably would apply to activities undertaken by Members of Congress, at least as individuals, i.e., outside the scope of their official duties as Congressmen.
- The speech and debate clause of the Constitution probably would not be sufficient to foreclose prosecution of a Member of Congress under 18 U.S.C. 953 so long as the conduct in question was not integral to the deliberative and communicative process of the House or Senate.

Of course, whether or not there exists any realistic possibility that any Member of Congress would ever be prosecuted under the Logan Act is another question. As the recent conversations between the visiting President of France and Democratic Presidential candidates Mondale and Hart illustrate, discourse between individual Members of Congress or private citizens and foreign officials has become quite commonplace. The mission of Presidential candidate Jackson to Syria which resulted in the release of the captured U.S. naval airman was, of course, theoretically a violation of the Logan Act, but certainly no one suggested that the Act be applied in that case.

Attachments

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Pt. 1

Ch. 45

FOREIGN RELATIONS

18 § 955

§ 952. Diplomatic codes and correspondence

Whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, or which purports to have been prepared in any such code, and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C.

§ 953. Private correspondence with foreign governments

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

§ 954. False statements influencing foreign government

Whoever, in relation to any dispute or controversy between a foreign government and the United States, willfully and knowingly makes any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the United States or any department or agency thereof, to the injury of the United States, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

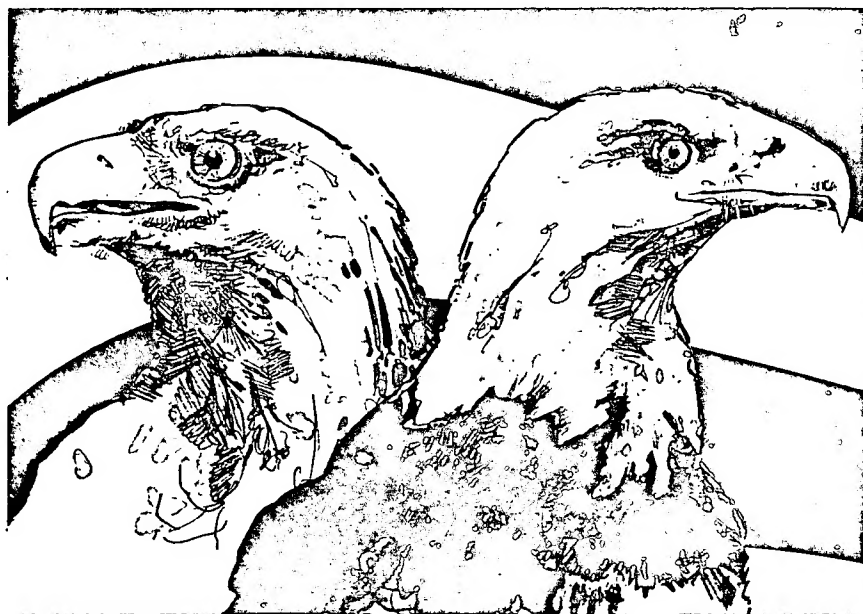
§ 955. Financial transactions with foreign governments

Whoever, within the United States, purchases or sells the bonds, securities, or other obligations of any foreign government or political subdivision thereof or any organization or association acting for or

Invitation to Struggle:

Congress, the President and Foreign Policy

Cecil V. Crabb, Jr. and Pat M. Holt



Politics and Public Policy Series

Congressional Assertiveness and Foreign Affairs 199

over, disunity within the executive branch is bound to exacerbate the problem of disunity within Congress itself in approaching diplomatic questions.

Late in 1979, one of President John F. Kennedy's former White House aides, Theodore C. Sorensen, made an earnest appeal to President Carter to "regain control" over the foreign policy machinery. In Sorensen's view:

Effective control over the conduct of foreign affairs is slipping away from Jimmy Carter, and that is sad to see... because a coherent and effective American foreign policy requires Presidential leadership.³⁸

Recent experience has shown that unless and until a unified foreign policy approach is supplied by the chief executive, the diplomacy of the United States will be marked by drift, ineffectualness, and the decline of national power abroad.

CONGRESSIONAL ASSERTIVENESS: CONSEQUENCES AND IMPLICATIONS

What impact has a more assertive and independent diplomatic role by Congress had upon American foreign policy? What have been its consequences — both positive and negative — upon the conduct of foreign relations by the United States? These questions will be examined in the light of our case studies and of other examples of Congress' recent dynamism in the foreign policy field.

→ Independent Legislative Initiatives

Until the period of the Vietnam War, it was a clearly established principle that negotiations with foreign governments were an executive prerogative. For example, longstanding precedent supports the view that the president or his designated agent "makes" or negotiates treaties with other governments. One of the earliest enactments of Congress was the Logan Act, which prohibits certain unauthorized negotiations between Americans and foreign officials. Although such contacts today have become frequent — and no citizen has ever been prosecuted for violating its terms — the Logan Act remains the law of the land.³⁹

In practice, from the period of World War II until the 1970s, legislators were frequently involved in the conduct of diplomatic negotiations — but nearly always at the invitation of the president. Today, the appointment of legislators as members of American negotiating teams is an accepted technique for creating bipartisan support for the nation's foreign policy. In the spring of 1979, the Carter administration attempted to win widespread congressional support for the proposed SALT II agreements with the Soviet Union by allowing "26 Senators, 14 Republicans and 12 Democrats, including opponents and critics, and 46

200 *Invitation to Struggle*

members of the House of Representatives, to sit in on the arms negotiations in Geneva."⁴⁰

The novel feature of Congress' involvement in diplomatic negotiations today is the tendency of legislators to engage in them independently — without White House approval, and sometimes in the face of presidential opposition. In 1979, Senator Jesse Helms, a member of the Senate Foreign Relations Committee, sent two staff members to London to participate directly in diplomatic discussions designed to end the longstanding civil conflict in Zimbabwe-Rhodesia. Senator Helms' justification was candid: "I don't trust the State Department on this issue."⁴¹

Another newsworthy example of Congress' direct intervention in foreign relations occurred after Iranian students seized the American embassy in Tehran on November 4, 1979, and held some 50 Americans hostage. After early White House efforts to gain the release of the hostages failed, Representative George Hansen, R-Idaho, undertook his own self-appointed peace mission to Iran, where he visited the hostages and sought to obtain their release. Hansen's efforts also failed, and his unauthorized negotiations during the crisis were criticized by executive and legislative officials alike, who feared his initiatives would undermine the president's authority and would provide evidence of disunity within the American government during the crisis.⁴²

Independent diplomatic efforts by Helms, Hansen, and other members of Congress appear to have established the precedent that legislators may now engage in the negotiating process freely. Perhaps legislators do so on the theory that — in the absence of overt White House objection — they have the president's tacit approval. In any case, the practice is bound to raise questions abroad about who is ultimately in charge of American foreign policy and about how durable agreements reached with a variety of American officials are likely to be.

~~The recognition of other governments is another area — long regarded as an executive province — into which Congress has intruded during the past decade. Early in 1979, several senators attempted to make President Carter's decision to recognize the People's Republic of China (PRC) contingent upon Peking's pledge not to use force in exerting its longstanding claim to sovereignty over Taiwan. In effect, these legislators wanted to threaten the PRC with withdrawal of American recognition if it attempted to seize Taiwan by force.⁴³ While the president and his advisers were mindful of congressional concern about the future of Taiwan, they were unwilling to condition American recognition upon the PRC's behavior in the matter.~~

~~Another recent example of independent congressional initiatives involves Zimbabwe-Rhodesia. Several members of the Senate Foreign Relations Committee proposed sending a team of private citizens, chosen by the committee, to observe forthcoming elections in that country — an unusual step designed to compel the White House to recognize a~~

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*History and Analysis of
Practice and Opinion*

EDWARD S. CORWIN



Fourth Revised Edition

NEW YORK UNIVERSITY PRESS
Washington Square New York

1957

Organ of Foreign Relations

refusing to send any communication to the Senate is not to be judged by legal right, but [is] . . . one of courtesy between the President and that body." "The record of practice amply bears out this statement.

Washington's success in foreshadowing "the shape of things to come" is seen also when we turn again to presidential monopolization of the right to communicate with foreign governments. The process envisaged is, it should be noted, a two-way process, depending on whether the President is its *terminus ad quem* or is its *terminus a quo*; in other words, is functioning as the nation's earpiece or its mouthpiece. The latter, obviously, is the vastly more important capacity, since, as was pointed out earlier, it involves potentially *formation*, as well as *formulation*, of the policy communicated; while the role of being earpiece is an essentially passive one. Even so, a Secretary of State found it necessary as late as 1833 to apprise foreign chancelleries that when they wished to inform the United States of royal births, deaths, marriages, and the like they should address their communications to "the President of the United States of America" and leave Congress out of the business. As to ordinary diplomatic intercourse, he added, it should be "carried on as usual" through the State Department.⁴²

→ Meantime Congress had itself come to the aid and protection of the President's prerogative to speak for the nation. This occurred in 1799, when one Logan, a Philadelphia Quaker, thought to avert war between the United States and France by undertaking a private negotiation with the latter. Manifesting perhaps some lack of humor, Congress passed a law to penalize such enterprises, entitling the measure "an Act to Prevent Usurpation of Executive Functions."⁴³ In later years, although presidential spokesmen frequently assumed strange disguises that might easily have caused confusion, "the Logan Act," while still on the statute books, dropped out of common ken till the period of the First World War. Then from 1920 on for several years excited patriots were constantly rising to demand that its penalties be visited, now on ex-President Taft and his League to Enforce Peace, now on Senator France for his philandering with "the Genoa Economic Conference," and at various times on Senator Borah, who, having become Chairman of the Foreign Relations Committee

Organ of Foreign Relations

about that time, had set up as a sort of State Department of his own."⁴⁴

Indeed, the First World War proved generally relaxing of the established etiquette of international intercourse, more or less permanently so. Early in 1920 Viscount Grey came to this country on an informal mission, but being unable to see the President, who was ill, held conversations with certain Senators respecting the League of Nations fight, following which he published a letter in the *London Times* stating that the Lodge reservations were "satisfactory" to the Allies. President Wilson, apparently missing the subtle flattery of this imitation of his own prior exploit in taking the Fiume question to the Italian people over the heads of their government, professed to be greatly angered at this "grossest possible breach of courtesy." Likewise, when Candidate Harding, then campaigning for the presidency from his own front porch in Marion, Ohio, was quoted in the papers to the effect that a French representative had approached him "informally" with the hope that he would "lead the way to a world fraternity," Mr. Wilson sharply questioned the Republican leader, who replied with elaborate irony: "Official France would never seek to go over your high office as our Chief Executive to appeal to the American people or any portion thereof." By way of contrast, President Hoover, following his defeat at the polls in November 1932, actually invited his successful rival to discuss with him certain proposals of the British Ambassador with regard to the war debt situation; and while Mr. Roosevelt declined the suggestion, he later on his own initiative invited the Ambassador to come to Warm Springs for a conference, thereby, as Mr. Krock of *The New York Times* commented, virtually taking over "this function of the Presidency a month before his inauguration."⁴⁵

*All such episodes to the contrary notwithstanding, there is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations.*⁴⁶

CONGRESSIONAL COLLABORATION AND CONTROL—RECOGNITION

But whatever emphasis be given the President's role as "sole organ of foreign relations" and the initiative thereby conferred

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ordered that official to hand the papers in question to him, and defied the Senate to do its worst. Archibald Butt, *Letters*, pp. 305-6.

⁴² *Senate Documents*, No. 56, 54th Congress, 2nd sess., p. 9 note; Moore, *Digest*, IV, 462; cf. notes 46 and 57 *infra*. No doubt, the discarded practice was a leftover from Revolutionary days, when all such communications were sent to the Continental Congress.

⁴³ For debate on the act see *Annals of Congress*, December 27, 1798, to January 25, 1799, *passim*. The measure, amended by the Act of March 4, 1909, 35 Stat. 1088, is now U. S. Code, tit. 18, § 5. See further "Memorandum on the History and Scope of the Laws Prohibiting Correspondence with a Foreign Government," *Senate Document*, No. 696, 64th Congress, 2nd sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General.

⁴⁴ *The New York Times*, October 19, 1920; *The Woman Patriot* (Washington, D. C.), May 1, 1922; *The New York Times*, June 22 and 23, 1930 and January 11, 1933. Mr. Ford's "Peace Ship" project early in 1915 did not of course fall within the purview of the Logan Act, not being intended "to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the government of the United States." A like enterprise would later on have appeared in a far different light. The latest American citizen to find the Logan Act shaken at him is Mr. Henry Wallace. This occurred when in April 1947 he went abroad to stir up sentiment against the "Truman Doctrine." See Mr. Krock's column in *The New York Times* of April 15, 1947.

⁴⁵ For Mr. Wilson's reaction to Grey's indiscretion see Washington dispatches of February 5, 1920. For the exchange between Wilson and Harding see *The New York Times* of October 19, 1920. Mr. Hoover's invitation to Roosevelt was sent from Yuma, Arizona, November 13, 1932; and the latter's invitation to Sir Ronald Lindsay was sent January 28, 1933.

⁴⁶ Presidential assertions of the principle have not always escaped a flavor of pedantry. In 1876 the governments of Pretoria and Argentina both sent congratulations to Congress on the occasion of the Centennial, and the following January Congress adopted joint resolutions of "high appreciation," which, however, were vetoed by President Grant on the constitutional ground:

"The usage of governments generally confines their correspondence and interchange of opinion and of sentiments of congratulation, as well as of discussion, to one certain established agency. To allow correspondence or interchange between states to be conducted by or with more than one such agency would necessarily lead to confusion, and possibly to contradictory presentation of views and to international complications.

"The Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and to receive all

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⁴⁹ *Ibid.*,

⁵⁰ *Memo*

⁵¹ Benton

⁵² *Senate*

⁵³ Richar

⁵⁴ *Ibid.*,

Years View

Chapter V

official communications from them. It gives him the power, by and with the advice and consent of the Senate, to make treaties and to appoint ambassadors and other public ministers; it intrusts to him solely 'to receive ambassadors and other public ministers,' thus vesting in him the origination of negotiations and the reception and conduct of all correspondence with foreign states, making him, in the language of one of the most eminent writers on constitutional law, 'the constitutional organ of communication with foreign states.'

"No copy of the addresses which it is proposed to acknowledge is furnished. I have no knowledge of their tone, language, or purport. From the tenor of the two joint resolutions it is to be inferred that these communications are probably purely congratulatory. Friendly and kindly intentioned as they may be, the presentation by a foreign state of any communication to a branch of the Government not contemplated by the Constitution for the reception of communications from foreign states might, if allowed to pass without notice, become a precedent for the address by foreigners or by foreign states of communications of a different nature and with wicked designs." Richardson, VII, 431.

Earlier, on August 14, 1876, Grant had sent a special message to the House protesting against a clause of the diplomatic appropriations act for the ensuing year that directed the President to notify certain diplomatic and consular officers "to close their offices." "In the literal sense of this direction," he asserted, "it would be an invasion of the constitutional prerogatives and duty of the President." *Ibid.*, 377. Late in 1928 Congressman Britten of Illinois, Chairman of the House Naval Committee, sent Prime Minister Baldwin of Great Britain a proposal that the latter call a naval limitation conference. When the British Premier sought to reply through the State Department, the latter declined to transmit the reply. Subsequently Mr. Britten and Commander Kenworthy, a member of Parliament, exchanged correspondence looking to an "unofficial conference" on the same subject between American M. C.'s and British M. P.'s. United Press dispatch, Washington, D. C., December 29, 1928. Nothing came of the idea.

"The very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations" is invoked by the Court in *United States v. Curtiss-Wright Corp.*, 299 U. S. at 320.

⁴⁷ On the general subject of recognition, see *Senate Documents*, No. 56, cited in note 42 *ante*; Moore, *Digest*, I, 67-255 *passim*.

⁴⁸ *Senate Documents*, No. 56, p. 30.

⁴⁹ *Ibid.*, p. 31.

⁵⁰ *Memoirs*, IV, 205-6.

⁵¹ Benton, *Abridgment*, VI, 168.

⁵² *Senate Documents*, No. 56, p. 36.

⁵³ Richardson, II, 209 (December 2, 1823).

⁵⁴ *Ibid.*, pp. 41-43; Richardson, III, 266-67; Thomas Hart Benton, *Thirty Years View* (Boston, 1854-56), I, 665-70.

64TH CONGRESS
2d Session

SENATE

DOCUMENT
No. 696

HISTORY OF LAWS PROHIBITING CORRESPONDENCE WITH A FOREIGN GOVERNMENT AND ACCEPTANCE OF A COMMISSION

MEMORANDUM

ON THE

HISTORY AND SCOPE OF THE LAWS PROHIBITING
CORRESPONDENCE WITH A FOREIGN GOVERNMENT
AND ACCEPTANCE OF A COMMISSION TO SERVE A
FOREIGN STATE IN WAR, BEING SECTIONS FIVE AND
NINE OF THE FEDERAL PENAL CODE

BY

CHARLES WARREN
ASSISTANT ATTORNEY GENERAL



PRESENTED BY MR. BRANDEGEE

JANUARY 29, 1917.—Referred to the Committee on Printing

WASHINGTON
GOVERNMENT PRINTING OFFICE
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SENATE RESOLUTION NO. 339.

BY MR. BRANDEGEE.

IN THE SENATE OF THE UNITED STATES,
January 31, 1917.

Resolved, That the manuscript submitted by the Senator from Connecticut (Mr. Brandegee) on January 29, 1917, entitled "Memorandum on the History and Scope of the Laws Prohibiting Correspondence with a Foreign Government, and Acceptance of a Commission to Serve a Foreign State in War," by Charles Warren, Assistant Attorney General, be printed as a Senate document, and that 500 additional copies be printed for the use of the Senate document room.

Attest:

JAMES M. BAKER,
Secretary.

BOOK

4576

MEMORANDUM ON THE HISTORY AND SCOPE OF THE LAWS PROHIBITING CORRESPONDENCE WITH A FOREIGN GOVERNMENT, AND ACCEPTANCE OF A COMMISSION TO SERVE A FOREIGN STATE IN WAR.

By CHARLES WARREN, Assistant Attorney General.

HISTORY AND SCOPE OF SECTION 5 OF THE FEDERAL PENAL CODE.

Sec. 5. Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country,¹ without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign Government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign Government or any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than \$5,000 and imprisoned more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign Government or its agents thereof for redress of any injury which he may have sustained from such Government or any of its agents or subjects.

GENERAL CONSIDERATIONS.

The original act, reproduced in section 5 of the Federal Penal Code (35 Stat. 1088, ch. 321, sec. 5, formerly Rev. Stat. sec. 5335), of the act of January 30, 1799 (1 Stat. 613). There have been no substantial changes except that the words "or in any place subject to the jurisdiction thereof," have been twice inserted.

The statute has never been construed in any reported case. It is cited in *United States v. Craig* (1886—28 Fed. 795, 801) as an illustration of the power of the United States to punish its own citizens for acts committed in a foreign country. It is also cited in *American Banana Co. v. United Fruit Co.* (1909—213 U. S. 347, 356).

They [civilized countries] go further, at times, and declare that they will punish one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and if they get the change, execute similar acts as to acts done within another recognized jurisdiction. An illustration from the statutes is found with regard to criminal correspondence with foreign governments. (Stat., sec. 5335.)

¹Word "who," which appeared in Revised Statutes, section 5335, has been, by oversight, omitted from section 5 of the act of March 4, 1909, chapter 321, now termed the Federal Penal Code of 1910.

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History, therefore, must throw the chief light upon the meaning of the statute. While congressional debates are not determinative of the meaning of statutory language, they are unquestionably of great aid in ascertaining the history of the period and the chief cause which led to the legislation.

As was said in *Standard Oil Co. v. United States* (1911—2 U. S., 1, 50):

The debates * * * show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of times. *

Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Association*, 166 U. S. 318 and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

Moreover, as the Supreme Court has not hesitated to have recourse to the debates in the Constitutional Convention of 1787 in order to ascertain the construction of words and phrases in the Constitution, the general rule as to the statutes laid down above may be somewhat relaxed when the congressional debates in question occurred over a hundred years ago and only 12 years after 1787, and in a time which has now become historical. Debates so long removed from present times and among men of historical eminence may be valuable aids toward the ascertainment of the purport and purpose of the legislation discussed.

OCCASION FOR THE ENACTMENT OF THE ACT OF 1799.

The immediate cause of the passage of the act of 1799 was the intermeddling of a private citizen, Dr. George Logan, in negotiations pending in 1798 between the United States and France.

President Adams, in 1797, had sent John Marshall, Charles Pinckney, and Elbridge Gerry as special envoys to France to negotiate and settle, if possible, all claims and causes of differences which then existed between the French Directory and the United States. From this mission arose the X Y Z letters controversy, the failure of the envoys, increased anti-France feeling in the United States, warlike preparations in Congress, and stringent measures against aliens. The envoys one by one returned, having accomplished nothing. Thereupon, Logan, a benevolent Quaker of Pennsylvania, undertook to act upon his own account. Bearing letters of introduction from Jefferson, Thomas McKean, and others, he sailed for France, more to do what the three envoys had failed to do. In France "he was hailed by the newspapers as the envoy of peace, was dined and feasted by Merlin (the new President of the Directory), received by Talleyrand, and came home to Philadelphia in November with some copies of old letters to the Consul General and the very assurance that France would negotiate for peace." (McMaster's History of the United States, vol. 4, pp. 368-410.)

While this errand had been sincerely intended, and probably without any partisan political motive, Logan was denounced by the Federalists during his absence and after his return as a treasonable envoy of the Republican party, carrying on a traitorous correspondence between the American and the French "Jacobins." On his return he was coldly received by the Secretary of State, and even more

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coldly by ex-President Washington, who regarded his action as fatal intermeddling. Federalists, in general, condemned him; and it was resolved that such interference should be forbidden in the future. President Adams wrote to Timothy Pickering, Secretary of State, November 2, 1798 (Life and Works of John Adams, Vol. VIII, p. 615):

The object of Logan, in his embassy, seems to have been to do or obtain something which might give opportunity for the "true American character to blaze forth in the approaching elections." Is this constitutional for a party of opposition to send embassies to foreign nations to obtain their interference in elections?

In his message to Congress, in December, 1798, the President, while dealing chiefly with relations with France, made no reference to Logan. The address of the Senate to the President, December 11, 1798, however, contained references to professions made by France "neglecting and passing by the constitutional and authorized agents of the Government" and "made through the medium of individuals without public character or authority." The President in his reply to the Senate, December 12, 1798, said (Messages and Papers of the Presidents, Vol. I, pp. 276, 277):

Although the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States, whether by their secret correspondence or otherwise, and intended to impose upon the people and separate them from their Government, ought not to be inquired into and corrected.

LEGISLATIVE HISTORY AND PURPOSES OF THE ACT OF 1799.

The history and purposes of the act of 1799 are fully set forth in Annals of Congress, Fifth Congress, 1797-1799, Volumes I and III, at the pages cited, infra.

The questions involved in the act were first presented in a resolution introduced in the House of Representatives, December 26, 1798 (p. 2488), by Roger Griswold, of Connecticut, as a proposal to amend the sedition law. He said:

Its object is to punish a crime which goes to the destruction of the Executive power of the Government—that description of crime which arises from an interference of individual citizens in the negotiations of our Executive with foreign Governments.

The resolution was as follows:

Resolved, That a committee be appointed to inquire into the expediency of amending the act entitled "An act in addition to the act for the punishment of certain crimes against the United States," so far as to extend the penalties, if need be, to all persons, citizens of the United States, who shall usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments of any foreign prince or state, relating to controversies or disputes which do or shall exist between such prince or state and the United States.

The resolution was debated December 27, 28, 1798 (pp. 2493 et seq.), by Congressmen of great eminence, Griswold, John Rutledge of South Carolina, Albert Gallatin of Pennsylvania, Thomas Pinckney of South Carolina, Robert Goodloe Harper of Maryland; Harrison Gray Otis of Massachusetts, John Nicholas of Virginia, Abra-

References to Logan's mission and the consequent legislation are also to be found in Writings of Thomas Jefferson, Vol. VII, letter of June 21, 1798, p. 273; Jan. 16, 1799, p. 161; Jan. 26, 1799, p. 326; Jan. 29, 1799, pp. 328, 339. Writings of Washington, Vol. XI, pp. 384, 388. See also Schouler's History of the United States, Vol. II, pp. 415, 417. Hildreth's History of the United States, Vol. II, p. 265. John Adams' Works, Vol. VIII, 615; Vol. IX, 243, 244, 265, 293, 307. Writings of John Quincy Adams, Vol. II, 249, 398, 399, and letters of Mar. 30, Aug. 11, 14, 15, Sept. 3, 4, 18, 25, Oct. 6, 1799. Lawton's Wheaton (1863), 1003. Wharton's State Trials, 20, 21. American State Papers, For. Rel. Vol. 122. Memoirs of Dr. George Logan.

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ham Baldwin of Georgia, John Williams of New York, Nathaniel Smith of Connecticut, Nathaniel Macon of North Carolina.

Griswold said that the object of the resolution was "of first importance"—

I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. The present situation of Europe, in my opinion, calls aloud for a resolution of this kind. * * * If offenses of this kind are to pass unpunished, it may be in the power of an individual to frustrate all the designs of the Executive. The agent of a faction, if such a faction shall exist, may be sent to a foreign country to negotiate in behalf of that faction, in opposition to the Executive authority, and will any one say that such an offense ought not severely to be punished? It certainly ought. * * * No gentleman would pretend to say that an unauthorized individual ought to exercise a power which should influence the measures of a foreign Government with respect to this country. This power has been delegated by the Constitution to the President, and the people of this country might as well meet and legislate for us, or erect themselves into a judicial tribunal, in place of the established judiciary, as that any individual, or set of persons, should take upon him or themselves this power, vested in the Executive. Such practices would be destructive to the principles of our Government.

Rutledge said that "if the citizens of this country shall be permitted to have intercourse with foreign Governments, they may do the greatest injury to this country under what they conceive to be the best intentions," and he stated that he thought this "a good measure of national defense."

Dana said that a person thus employed—

must be considered as acting in direct hostility with the authority of our Government and against the general character of our country. * * * It is a crime of severe magnitude, as the person thus acting must be considered as the agent of a faction waiting only for an opportunity of joining the enemies of their country.

Pinckney said that it was a leading doctrine of republican government that "no one can pretend to interfere so as to counteract the proceedings of the people of their country as expressed by its legal organs." He stated that he—

knew of no case, no situation, on which it would be lawful or right for an individual to interfere with a foreign Government at a time when any negotiation is going forward by legal authority. Such an interference can have but a bad effect; it may have a very bad effect. It shows, at least, that there is a party in the country divided from the Government who take upon themselves a separate negotiation, and set up a distinct power, which they wish to be paramount to the legal authority.

Harper said:

The principle once admitted must go to the utter subversion of government—the principle being that whenever an individual, or, by stronger reason, a number of individuals, conceive themselves wiser than the Government, more able to discern or more willing to pursue, the interest of the country, they may assume its functions, counteract its views, and interfere in its most important operations. * * * Upon this pretense, if this principle be once established, any discontented faction, under the name of a club, or patriotic society, or revolution society, * * * may usurp the most essential functions of government in their own country, negotiate on all sorts of subjects with the Governments of other countries, and open a direct and broad road for the entrance of that foreign influence which, with equal and force, has been declared as the "angel of destruction to republican governments." * * * When we knew that that (foreign) Government openly avows its determination to encourage such intercourse, to protect all factions, all malcontents, all insurgents in all countries, when we knew that this intercourse and her consequent protection of domestic factions are the great engines of her foreign policies—when we know all this, shall we not oppose an effectual barrier?

The resolution was passed, 65—23 (p. 2545), and Griswold, Pinckney, Baldwin, Bayard, and Spaight were appointed a committee.

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A bill based on the resolution was introduced in the House by Mr. Griswold January 7, 1799, as follows (pp. 2565, 2583):

Be it enacted, &c., That if any person, being a citizen of the United States, whether he be actually resident or abiding within the United States, or in any foreign country, shall, without the permission or authority of the Government of the United States, directly or indirectly, commence or carry on any verbal or written correspondence or intercourse with any foreign Government, or any officer or agent thereof, relating to any dispute or controversy between any foreign Government and the United States, with an intent to influence the measures or conduct of the Government, or to bring disputes or controversies with the United States, as aforesaid; or of any person, being a citizen of, or resident within, the United States, and not duly authorized shall counsel, advise, aid, or assist, in any such correspondence, with intent as aforesaid, he or they shall be deemed guilty of a high misdemeanor: and, on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding ——— thousand dollars, and by imprisonment during a term not less than ——— months, nor exceeding ——— years.

The bill was debated at length under the heading of "Usurpation of executive authority," from January 9 to January 17, 1799 (pp. 2583 et seq.), by many eminent Congressmen in addition to those already speaking on the resolution—James A. Bayard of Delaware, Jonathan Dayton of New Jersey, Carter B. Harrison of Virginia, William C. Claiborne of Tennessee, Thomas Claiborne of Virginia, Isaac Parker of Massachusetts, Edward Livingston of New York, Joseph McDowell, John Dennis, Jonathan Brace, Samuel Smith, Samuel Sewall, John Dawson, Josiah Parker, William Gordon, Joseph Eggleston, George Thatcher, John Allen, William Edmond, and others.

The principal opposition came from Albert Gallatin and Edward Livingston, and was largely based on an unfounded fear that the bill would prevent private individuals corresponding in regard to their private and personal affairs.

Gallatin argued (p. 2586):

All cases where a change of the measures of government was attempted, though it were done merely by an individual to secure his private rights, would come within the meaning of this bill. Thus, if an individual whose vessel is taken by the French should, after his vessel is carried into one of their ports, remonstrate or enter into a correspondence with any of the agents of that Government he must do it in such a manner as his arguments shall not involve any of the general principles in dispute between the two Governments; because the moment he does this he falls within the penalties of the bill. It appeared extremely difficult that an individual who is not only personally concerned for himself but an agent for others should be able to make any effectual application to the French Government without taking into consideration in some respect the principles of dispute between the two Governments.

He wished the bill amended so as to exclude this.

Otis said in reply that the words, "with an intent to influence the measures of a foreign Government" must relate to general public measures, not to the concerns of any individual.

A motion was made to insert in place of "as follows" the words "so as to prevent or impede the amicable adjustment of said disputes and controversies."

Bayard said:

If this amendment were to pass, a person might carry on any correspondence whatever and no punishment could be inflicted upon him, unless a bad intention was proved.

The object of the law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only. An individual may do good, but he may also do evil; and it can not be supposed that a private person has more wisdom or greater desire to serve his country than the Executive of the United States.

The amendment was lost (51 to 33), and on being reviewed was again lost (51 to 35). Later in the debate Gallatin, supported by Nicholas, moved to add the following proviso (p. 2591):

Provided, That nothing in this act contained shall be construed to extend to any person who shall apply to any foreign Government, or to any officer or agent thereof, for the purpose of obtaining either the releasement of American seamen or for the restoration of any property belonging to citizens of the United States and captured, sequestered, or detained by or under the authority of any such foreign Government or any of its officers or agents, or for the payment of any debts due by such Government to the citizens of the United States.

Bayard opposed, saying the bill was not intended to apply to such case and there was no need of the proviso:

In order to establish a crime by this bill, what is to be proved? First, that there are disputes subsisting between the United States and the foreign nation with whom the correspondence is said to have taken place; that this intercourse has really existed; and that it was carried on with a view to influence the measures or conduct of the foreign Government in relation to any disputes or controversies with the United States; and unless all these facts are proved, the crime is not made out. The intention must be proved before the crime will appear.

Dana said that—

the disputes and controversies mentioned in this bill are those which exist between the Government of the United States and foreign Governments—disputes and controversies of a political nature, unconnected with individual claims.

Edmond said:

It will be wise and prudent at this time to frame a law to prevent individuals from interfering with the Executive authority in a manner injurious to the community.

The proviso was defeated (48 to 37).

A motion to add after the word "influence" the words "or defeat" was made by Joseph Parker (p. 2588), saying that he wished "to make the bill as complete as possible and to put every check upon individual interference with foreign negotiations, which the Government had in its power to do so."

The amendment was voted (48 to 30).

Dayton proposed an amendment to strike out the words "relating to any dispute or controversy between any foreign country and the United States," and also the word "having" and the words "as aforesaid," and to insert in place of "having" the words "in relation to any."

These amendments were voted.

Further statements as to the purpose and intent of the bill were made in the debates on January 10, 1799 (p. 2599), January 11, 1799 (pp. 2626, 2648), January 16 (pp. 2677, 2682), January 17 (pp. 2686, 2721).

Bayard said: "The offense proposed to be punished by this law is separated only by a shade from treason." Referring to the particular action of Dr. Logan, out of which the bill arose, he said: "It must be clear to every reasonable man that a law of this kind is a necessary barrier to guard against an arrogation of power in public factions. The bill is founded on justice and policy."

Griswold said that the object of the bill was perfectly well known and understood "to prevent all interference with the Executive power in our foreign intercourse."

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Pinckney said that a grave evil existed which it was wise for all nations to prepare against:

This evil is no less than an endeavor on the part of one government, by means of its diplomatic skill, to overset all the governments which do not concur with them in its mad career. It is become necessary, therefore, for us, in common with other nations, to guard against this evil, and to oppose it by such barriers as are within our power. Upon this footing, the bill now before the House might be justified, if no inconveniences had already been experienced which make such a law necessary. * * * If an individual goes forward to a foreign government to negotiate on national concerns, any sensible government must either laugh at such a man as mad or conclude that he is the agent of a deep-rooted party opposed to the government of the country from which he comes. And certainly no individual ought to be permitted to do an act with impunity which might throw so great a contempt upon the government of his country.

Harper said:

It was this intent which constituted the essence of the offense; an intent to interfere in the political relations of this country with foreign nations, or to defeat the measures of our own Government. * * * It is this interference, this intermeddling, and not an accidental conversation, which the bill forbids. The bill includes, in order to constitute the offense required, that the act should be done with an intent to interfere with the functions of government, and intermeddle with the political relations of the two countries.

Brace said:

The bill proposes to punish any person who shall interfere in any controversy or dispute between the Government and any of these foreign Governments. * * * Indeed, this is a part of our defense which is above all others necessary, as it will defend us against foreign intrigue, against what has already brought upon this country great calamities and involved many others in irretrievable ruin. This crime is, of all others, of the deepest dye. * * * The evil of an offense of this kind is that it involves a whole nation and puts at hazard everything we hold dear.

Rutledge said—

that in all well-constituted Governments it is a fundamental principle that the Government should possess exclusively the power of carrying on foreign relations.

Isaac Parker said that—

this bill is founded on the principle that the people of the United States have given to the executive department the power to negotiate with foreign Governments and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign power on any dispute between the two Governments.

Various motions to amend the bill in unessential ways, including a motion to limit its operation to one year, were made and defeated (pp. 2679-2682); and the bill was finally passed in the House of Representatives January 17, 1799, by a vote of 58 to 36 (p. 2686). The bill was introduced in the Senate, and passed on January 25, 1799, by a vote of 18 to 2. It was signed and became a law, January 30, 1799 (1 Stat. 613).

THE ELEMENTS OF THE CRIME.

The actions made criminal by the statute fall into two classes: (1) Those performed by United States citizens wherever resident or abiding; (2) those performed by a person resident in the United States, whether alien or citizen.

(1) The actions forbidden to United States citizens are:
(a) Without the permission or authority of the Government;
(b) Directly or indirectly;

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(c) To commence or carry on any verbal or written correspondence or intercourse with any foreign Government or any officer or agent thereof.

Or—

(d) To counsel, advise or assist in any "such correspondence," i. e., in any verbal or written correspondence by a United States citizen with any foreign Government or any officer or agent thereof;

(e) With an intent to influence the measures or conduct of any foreign Government or any officer or agent thereof in relation to any disputes or controversies with the United States,

Or—

(f) With an intent to defeat the measures of the Government of the United States.

(2) The actions forbidden to persons resident within the United States, whether alien or citizen, are: to counsel, advise or assist in the verbal or written correspondence, or intercourse made criminal as above, with the intent designated as above.

The dictionaries in vogue in or about 1799 define the phrase "to carry on," used in the statute, as follows:

Johnson's Dictionary of the English Language (London, 1755, Todd's Ed., 1818):

To carry on: To promote; to help forward; to continue; to put forward from one stage to another; to prosecute; not to let cease.

Sheridan's English Dictionary (London, 1790) and Walker's Dictionary of the English Language (London, 1791):

To carry on: To promote; to help forward.

Webster's American Dictionary (1828):

Carry on: To promote, advance, or help forward; to continue; as, to carry on a design; to carry on the administration of grace; (2) to manage or prosecute; as, to carry on husbandry; (3) to prosecute, continue, or pursue; as, to carry on trade or war.

Similar dictionaries define the words "correspondence" and "intercourse" as follows:

Sheridan's English Dictionary (London, 1797), and Walker's Dictionary of the English Language (London, 1791):

Correspondence: Intercourse, reciprocal intelligence.

Intercourse: Commerce, exchange, communication.

Dyche's English Dictionary (London, 1794):

Correspondence: Intercourse by letter or otherwise.

Intercourse: Commerce, exchange, mutual communication.

Entick's New Spelling Dictionary (London, 1791):

Correspondence: Agreement, fitness, intercourse.

Intercourse: Communication, commerce, trade.

Johnson's Dictionary of the English Language (London, 1755):

Correspondence: (2) Intercourse, reciprocal intelligence.

Intercourse: (1) Commerce, exchange; (2) communication.

Kersey's English Dictionary (London, 1721):

Correspondence: Holding intelligence, intercourse, mutual commerce.

Intercourse: Mutual commerce, traffic, or correspondence.

Marchant's New English Dictionary (London, 1760):

Correspondence: Intercourse, reciprocal intelligence.

Intercourse: Commerce, communication, free and mutual correspondence between persons.

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From the above it would appear that the words "correspondence" and "intercourse" were interchangeable or synonymous. "Correspondence" is evidently used in the statute in the sense of "general communication or intercourse with," and can not be limited to the technical sense of "communication by letter" inasmuch as it is preceded in the statute by the words "verbal or written."

Proof of intent is, of course, an essential element of the crime. Intent is to be determined from the facts, circumstances, and surroundings at the time of the transaction and from the defendant's prior course of dealing. If the natural and probable result of commencing or carrying on the correspondence or intercourse in question or assisting therein would be the influencing of a foreign Government or its officials or would be the defeat of measures of the United States Government, then the law presumes that the person so acting intended so to influence or defeat. In other words, there is a presumption of law that a person intends the natural and probable consequence of acts knowingly done by him.

See in general: *Reynolds v. United States* (1878—98 U. S. 145, 167); *Allen v. United States* (1896—164 U. S. 492, 496); *Agnew v. United States* (1897—165 U. S. 36, 50, 53); *United States v. Quincy* (1832—6 Peters 445, 467; 11 L. R. A. Note p. 810).

"Any officer or agent" of "any foreign Government" is a broad term and clearly includes diplomatic and consular officers located in the United States, so that intercourse or correspondence with them in the United States by a United States citizen, if for the purpose and with the intent prescribed by the statute, is forbidden.

The only other phrase in the statute about which any question is likely to arise is the scope of the phrase "in relation to any disputes or controversies with the United States."

Consideration of the history and general purposes of the statute makes it clear that this phrase refers to all questions which are at the time the subject of diplomatic or official correspondence or negotiation between the United States and the foreign country.

GENERAL OBJECT OF THE STATUTE.

Under the Constitution, Article II, section 23, the President has the power (by and with the advice and consent of the Senate) to appoint ambassadors and other public ministers and consuls" and "shall receive ambassadors and other public ministers." By the act of July 27, 1789, chapter 4 (1 Stat., 28), it was provided that—

"There shall be an executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary of the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions, instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign States or princes, or to memorials or applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct

the act of Sept. 15, 1789, ch. 14 (1 Stat., 68), the name of the Department of Foreign Affairs was changed to that of the Department of State. These statutes are embodied in the Revised Statutes, sec.

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the business of the said department in such manner as the President of the United States shall from time to time order or instruct.

These functions of the President with reference to foreign nations were stated by Jefferson to Genet, the French minister, in a letter November 22, 1793, as follows:

He [the President] being the only channel of communication between this country and foreign nations or their agents, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the Nation.

The Executive, therefore, is the head of the Government, especially "charged with our foreign relations," and their conduct. See *Williams v. Suffolk Insurance Co.* (1839—13 Peters, 415, 420), in which case it was so held, and the President's decisions as "to what sovereignty any island or country belongs" was held to be "in the exercise of his constitutional functions," and "under the responsibilities which belong to him."

It is highly important to the welfare of the country that there shall be no interference with the President's constitutional and statutory functions, and especially no attempt to influence or intermeddle in official foreign negotiations carried on by him, through private negotiations with foreign officials in relation to the same subject matter. In foreign negotiation, the President must speak for the people of this country. Private individuals can not be allowed to open negotiations which might have the effect of inducing or promoting in the foreign country views as to discord or faction in this country.

The influencing of a foreign nation by correspondence with foreign officials upon a question in dispute between it and the United States, or upon a measure of the United States, is a function which should be possessed solely by the Government, and which a private citizen ought not to be allowed to assume.

PROCEEDINGS UNDER THE STATUTE.

Moore, in his *Digest of International Law* (1906), volume IV, page 449, says:

As to Pickering's subsequent violation, when out of power and in opposition, of the statute, the enactment of which he had inspired, see *Adams's History of the United States*, IV, 236 et seq.

No conviction or prosecution is known to have taken place under this act, although it has on various occasions been invoked, officially or unofficially, as a possible ground of action against individuals who were supposed to have infringed it.

President Jefferson by message of December 21, 1803, laid before Congress correspondence with Charles Pinckney, minister to Spain, relative to responsibility of Spain for "French seizures and condemnations of our vessels in the ports of Spain, for which we deemed the latter power responsible," and for which "our minister at that court was instructed to press for an additional article" in the proposed treaty or convention "comprehending that branch of wrongs."

Among the papers transmitted were copies of opinions rendered by five of the most eminent American lawyers, Jared Ingersoll, William Rawle, Joseph B. McKean, Peter S. Duponceau, all of Philadelphia, and Edward Livingston, of New York, on an abstract question submitted to them by the Government of Spain, and which opinions were used by the Spanish ministry in declining to adopt the suggestions for an arbitration treaty made by Pinckney. The latter

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insisted that arbitration must include every class of case of wrong to American citizens, both losses due to acts of Spanish subjects and to acts of French consuls, etc., in Spanish ports—Spain being liable under the law of nations for the acts of aliens in her territory. (See Annals of Congress, Eighth Congress, 2d sess., App., pp. 1261, et seq.)

The legal opinions were rendered in November, 1802, on an abstract hypothetical case, and were adverse to the contentions of the United States as advanced by Pinckney as to the rights of the United States to indemnity under the law of nations. Pinckney claimed that the abstract question did not present the actual facts in the case, and that the United States had never relinquished any rights which it had against Spain by any convention with France.

As a result of this action on the part of American lawyers, a committee of the Senate, to whom the President's message had been referred, made the following report to the Senate February 24, 1804 (see Executive Journal of the Senate, Vol. I, p.468):

Upon a careful examination of the message and documents communicated by the President on the 21st of December your committee notice certain unauthorized acts and doings of individuals, contrary to law and highly prejudicial to the rights and sovereignty of the United States, tending to defeat the measures of the Government thereof, and which, in their opinion, merit the consideration of the Senate.

They find that on the 15th of November, 1802, and before and subsequent to that day, divers controversies and disputes had arisen between the Governments of the United States and Spain concerning certain seizures and condemnation of the vessels and effects of the citizens of the United States in the ports of Spain, and for which the Government of Spain was deemed responsible, and in the prosecution of which, for indemnification, the minister of the United States near the Court of Spain had been instructed to press that Government, by friendly negotiation, to provide for those wrongs.

Your committee find, while said negotiation was pending and the said disputes and controversies in nowise settled or adjusted, that Jared Ingersoll, William Rawle, Joseph B. McKean, and P. S. Duponceau, of the city of Philadelphia, did, at said Philadelphia, on the same 15th of November, 1802, and Edward Livingston, of the city of New York, did, at said New York, on the 3d day of the same November, in violation of the act entitled "An act for the punishment of certain crimes therein specified," passed the 30th day of January, 1799, commence and carry on a correspondence and intercourse with the said Government of Spain and with the agents thereof, and, as your committee believe, with an intent to influence the measures and conduct of the Government of Spain and to defeat the measures of the Government of the United States; and did, then and there, counsel, advise, aid, and assist, in such correspondence with intent as aforesaid.

Your committee, with the knowledge of these facts, are compelled to observe that however there might exist in Senate a great reluctance to express any opinion in relation to proceedings in the ordinary course of criminal jurisprudence yet, when they reflect on the nature of the offense, the improbability of the ministers of the law ever coming to the knowledge thereof without the aid of the Executive, and the delicate situation of the Executive in relation to the subject, duty seems to demand and propriety to justify their expressing an opinion in favor of that aid, without which, in their judgment, the justice of the Nation would be exposed to suffer.

Your committee have no doubt that precedents may be adduced, and from the best authority, to justify such a measure and warrant the proceedings with safety to the remedial justice of the law, which admits of no rules, or pretended rules, uncorrected and uncontrolled by circumstances, the certain result of which would be the failure of justice.

With these impressions, your committee respectfully offer to the Senate the following resolution:

Resolved, That the President of the United States be requested to cause to be laid before the Attorney General all such papers, documents, and evidence, as he may deem expedient, and which relate to any unauthorized correspondence and intercourse, carried on by Jared Ingersoll, William Rawle, Joseph B. McKean, P. S. Duponceau, and Edward Livingston, with the Government of Spain, or with the

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agents thereof, with an intent to influence the measures and conduct of the Government of Spain, or to defeat the measures of the Government of the United States in relation to certain disputes and controversies between the said Governments.

Resolved, That, if in the opinion of the Attorney General, such papers, documents, and evidence, or such other evidence as may be presumed, from any that is particularly criminis, shall be deemed sufficient to warrant a prosecution of the aforesaid persons, or either of them, that the President of the United States be, and hereby is, requested to instruct the proper law officer to commence a prosecution, at such time and in such manner as he may judge expedient, against Jared Ingersoll, William Rawle, Joseph B. McKean, P. S. Duponceau, and Edward Livingston, or either of them, on the act, entitled "An act for the punishment of certain crimes therein specified." And that he be requested to furnish the attorney on the part of the United States for the purpose of carrying on said prosecution, with such papers, documents, and evidence, from the Executive Department of the Government, as he may deem expedient and necessary.

A motion was made by Mr. White, that it be

Resolved, That the Senate will take no further order on the report made to them respecting the opinions of certain lawyers, relating to the convention between the United States and His Catholic Majesty; the Senate not considering it within the province of their duty to do so, and that the injunction of secrecy upon the same be taken off.

On motion,

Ordered, That the consideration of this resolution be postponed to the first Monday in November next.

No action on the resolution was ever taken (see Foster's Century of American Diplomacy, 229).

The only other instances in which the statute has been utilized are cited by Moore (Sec. 631), as follows:

The last clause of the statute was appealed to by Mr. Seward in 1861, to stop certain proceedings of Mr. Bunch, British consul at Charleston, S. C., in urging the British Government to recognize Confederate independence. (Bernard's Neutrality of Great Britain, 185, and *infra*, Sec. 700.)

See, in relation to the Sackville case, and the "Murchison correspondence," the report of Mr. Bayard, Secretary of State, to the President, Oct. 29, 1888. For. Rel. 1888, 11, 1670; *infra*, sec. 640.

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HISTORY AND SCOPE OF SECTION 9 OF THE FEDERAL PENAL CODE.

Sec. 9. Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, State, colony, district, or people, in war, by land or by sea, against any prince, State, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.

GENERAL CONSIDERATIONS.

A question has been presented as to the meaning of the word "commission" in Federal Penal Code, section 9 (formerly Rev. Stat., sec. 5281). A review of the history and purpose of the statute will clearly show that it was intended to apply primarily to the acceptance and exercise by United States citizens of commissions to serve a foreign belligerent nation in some military or naval capacity; and that it can not legally be applied to any service other than in some office formally created by the foreign Government and required to be evidenced by the official warrant termed a "commission."

The original act reproduced in this section 9 is section 1 of the act of June 5, 1794 (1 Stat., 381), the necessity for the passage of which arose from the following series of events:

On the outbreak of the war between France and England in 1793 Washington wrote from Mount Vernon to each member of his Cabinet, April 12, 1793, that "it behooves the Government of this country to use every means in its power to prevent the citizens thereof from embroiling us with either of these powers by endeavoring to maintain a strict neutrality. I therefore require that you will give the subject matter mature consideration that such measures as shall be deemed most likely to effect this desirable purpose may be adopted without delay;" and he called a Cabinet meeting for April 19 at his house in Philadelphia, submitting 13 questions for consideration. At this meeting the famous so-called "neutrality proclamation," drafted by the Attorney General, Edmund Randolph ("badly drawn," as Jefferson wrote), was determined upon and issued April 22, in which it was stated that the "duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward belligerent powers"; and it warned all citizens "carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such dispositions," and not to violate the law of nations, under penalty of prosecution.

While always termed a "neutrality proclamation," the word "neutrality" was omitted from it by express purpose, in order to avoid committing the Cabinet to the position that the President had power to declare that there should be no war—Jefferson especially having

The letters and documents referred to in this memorandum will be found in The Writings of George Washington (Ford's Ed., 1891), vol. 12; The Writings of Thomas Jefferson (Ford's Ed., 1895), vols. 1, 6; The Correspondence and Public Papers of John Jay (1891), vol. 3; The Works of Alexander Hamilton (1802), vol. 2; American State Papers, Foreign Relations, vol. 1.

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opposed the use of the word.¹ (See Writings of Thomas Jefferson, Vol. VI, letters of June 23, 29, July 14, Aug. 11, 1793.) Its purpose was therefore not to serve as an announcement of the political status of the United States, but rather to require such line of action on the part of its citizens as would prevent international complications. In a series of letters signed "Pacificus," in June and July, 1793, Hamilton defended the proclamation on the very ground that: "Its main object is to prevent the Nation's being responsible for acts done by its citizens, without the privity or connivance of the Government, in contravention of the principle of neutrality; an object of the greatest moment to a country whose true interest lies in the preservation of peace;" and later he stated in a draft for the President's annual address to Congress, "it was probable that designing or inconsiderate persons among ourselves might from different motives embark in enterprises contrary to the duties of a nation at peace with nations at war with each other * * * and of course calculated to invite and to produce reprisals and hostilities."

The actions of the new French minister, Genet, and of United States citizens favoring the French cause, soon showed the necessity for the warning conveyed by the proclamation and for preventive or punitive action on the part of the United States.

These actions, which were deemed violative of the laws of nations as to the obligations of a neutral power, fell, in general, into five classes:

(a) The fitting out and equipping in our ports of American and French privateers.

(b) The holding of prize courts in this country by French consuls.

(c) The enlisting of American citizens by the French minister.

(d) The issue of commissions by the French minister to commanders of privateers, both French and American.

(e) The issue of commissions by the French minister to persons to serve as military officers to conduct hostilities against nations with which the United States were at peace.

The last two classes of acts were those to prevent which the congressional legislation in question was directed.

As early as May 15, 1793, Jefferson (Secretary of State) wrote to the French minister:

Our information is not perfect on the subject matter of another of these memorials, which states that a vessel has been fitted out at Charleston, manned there, and partly too with citizens of the United States, received a commission there to cruise against nations at peace with us, and has taken and sent a British vessel into this port. Without taking all these facts for granted, we have not hesitated to express our highest disapprobation of the conduct of any of our citizens who may personally engage in committing hostilities at sea against any of the nations parties to the present war; to declare that, if the case has happened, or that it should happen, we will exert all the means with which the law and Constitution have armed us, to discover such offenders and bring them to condign punishment.²

To this Genet answered, May 27, that he

believed no law existed which could deprive French citizens in the ports of the United States of the privilege of putting their vessels in a state of defense, of taking, in time of war, new commissions, and of serving their country by causing them to cruise out of the United States on the vessels of their enemy.

¹ See especially a speech by R. G. Harper, giving a history of this whole affair from a Federalist standpoint. (Annals of Congress, 5th Cong., 1st sess., pp. 1192 et seq., Mar. 2, 1793.)

² See, also, Hamilton's opinion rendered to the President, May 15, 1793. (Hamilton's Works, Vol. IV, 399.)

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Jefferson replied, June 5, 1793:

* * * the granting military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe their own country.

To this, Genet retorted, June 8:

At all times, like commissions, during a war, have been delivered to our vessels. The officers of the marine transmit them to them, in France, and the consuls, in foreign countries; and it is in virtue of this usage, which no power has ever thought of regarding as an act of sovereignty, that the executive council has sent here such commissions. * * * It results from this note, * * * that the commissions transmitted in virtue of the Executive Council of the Republic of France to the French vessels in the ports of the United States are merely an authority to arm themselves, founded upon the natural right and usage of France, that these commissions have been expedited at all times, in the like circumstances; that their distribution can not be considered but as an act of consular administration, and not of sovereignty.

In a subsequent letter of June 17, referring to another infraction of neutrality, Jefferson wrote that it was—

a repetition of that which was the subject of my letter of the 5th instant which animated not merely on the single fact of the granting commissions of war by one nation within the territory of another, but on the aggregate of the facts.

The questions relating to neutrality became so numerous and serious that, after consideration at a Cabinet meeting between July 12 and 18, the President resolved to ask the Justices of the Supreme Court to express their opinions on a list of 21 questions drafted by Hamilton, to which Jefferson added 8 more. The letter to the court July 18, drafted by Jefferson, was as follows:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, & of greater importance to the peace of the U. S. These questions depend on their solution on the construction of our treaties, on the laws of nature & nations, on the laws of the land; and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so embarrassing & difficult to them. The President would therefore be much relieved if he found himself free to refer questions of this description to the opinions of the Justices of the Supreme Court of the U. S. whose knowledge of the subject would secure against errors dangerous to the peace of the U. S. and their authority ensure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinions? and if they may, with propriety, be availed of their advice on these questions? and if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion forbid them to pronounce on.

To this, the justices replied, July 20, that they felt a reluctance to decide in the absence of some of their number, but saying:

We are pleased, sir, with every opportunity of manifesting our respect for you, and solicitous to do whatever may be in our power to render your administration as agreeable to yourself as it is to our country. If circumstances should forbid our delay, we will immediately resume the consideration of the question, and decide it.

Washington wrote again, July 23, stating that he did not desire to press the court, but that the circumstances which had induced him to ask their counsel still existed, and on August 8, the justices replied:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of

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separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly limited to the executive departments.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

Jefferson had written to Madison, August 3, that the judges "will not agree, I believe, to give opinions," and, on August 11, that

I mentioned to you that we had convened the judges to consult them on the questions which have arisen on the law of nations. They declined being consulted. In England, you know, such questions are referred regularly to the Judge of Admiralty. I asked E. R. [Edmund Randolph, Attorney General] if we could not prepare a bill for Congress to appoint a board or some other body of advice for the Executive on such questions. He said he should propose to annex it to his office. In plain language, this would be to make him the arbiter of the line of conduct for the United States towards foreign nations.

Meanwhile the question had arisen in the Federal courts whether, in the absence of any statute, persons could be punished who offended against the laws of nations, particularly in engaging in privateering or enlisting against countries with which the United States were at peace. The first case was that of the indictment in the circuit court in Philadelphia on July 27, 1793, of Gideon Henfield, who had served as a prize master, an officer of a privateer fitted out in Charleston under a commission issued from France.¹ The case was prosecuted by the Attorney General, Randolph, and United States Attorney William Rawle, against Pierre Duponceau, Jared Ingersoll, and John Sergeant. The court, consisting of two Justices of the Supreme Court—Wilson and Iredell, and District Judge Peters—charged the jury that "the acts of hostility committed * * * are an offense against this country and punishable by its laws," being in violation of the laws of nations and of existing treaties, and in spite of the absence of any statute making the acts penal. A similar doctrine had been upheld by Chief Justice Jay in a charge to the grand jury in the preceding May.

Considerable doubt was felt in the United States as to the validity of this decision, and the desirability of legislative action by Congress became evident. Jefferson, as early as July 14, 1793, wrote to Monroe that:

I confess I think myself that the case is punishable and that, if found otherwise, Congress ought to make it so, or we shall be made parties in every maritime war in which the piratical spirit of the banditti in our ports can engage.

The actions of the French minister and consuls still continued, and the Cabinet finally determined to write to our minister in France, Gouverneur Morris, to lay the matter before the French Government and suggest recall. In his letter to Morris of August 16, 1793, Jefferson referred to Genet, who "arms vessels, levies men, gives commissions of war * * * when they [the Government] forbid vessels to be fitted in their ports for cruising on nations with whom they

¹ For form of the commissions issued, see Wharton's State Trials, p. 51, note. As to Henfield's case see U. S. Gazette, June 5, July 31, 1793; Hamilton's Works, Vol. IV, 451.

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are at peace, he commissions them to fit and cruise," and stated further:

Mr. Genet asserts his right of arming in our ports and of enlisting our citizens, and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proof from the most enlightened and approved writers on the subject that . . . the right of raising troops being one of the rights of sovereignty and appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; and he who does may be rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments * * * we hold it certain that the law of nations and the rules of neutrality forbid our permitting either party to arm in our ports.

On September 7, 1793, Jefferson issued a circular to French consuls in the United States stating that as it appeared from their advertisements in the public papers that "they are undertaking to give commissions within the United States and to enlist or encourage the enlistment of men, natives or inhabitants of these States, to commit hostilities on nations with whom the United States are at peace, in direct opposition to the law of the land," the President would revoke the exequatur of any consul committing any such act.

Genet did not confine his activities, however, to the granting of commissions to commanders of privateers. He actively organized, on United States soil, military expeditions against Spanish and English possessions and granted commissions to United States citizens to act as officers on these expeditions and on other expeditions to be organized on foreign soil.

As early as July 5, 1793, Jefferson records in his *Anas* a conversation with Genet as to a proposal "that officers shall be commissioned by himself in Kentucky and Louisiana, that they shall rendezvous out of the territories of the U. S. * * * to undertake the expedition against New Orleans. * * * I told him that his enticing officers and souldiers from Kentucky to go against Spain was really putting a halter about their necks, for that they would assuredly be hung if they commenced hostilities against a nation at peace with the U. S.

Under these conditions, when Congress assembled December 3, 1793, President Washington in his address laid before it his "neutrality proclamation," the regulations formulated under it, and the reasons for his action; and he further strongly recommended legislation by Congress:

It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions. . . . Where individuals shall, within the United States, array themselves in hostility against any of the powers at war; or enter upon military expeditions or enterprises within the jurisdiction of the United States; or usurp and exercise judicial authority within the United States; or where the penalties on violations of the law of nations have been indistinctly marked, or are inadequate; these offenses can not receive so early and close an attention, and require prompt and decisive remedies. * * *

Within a month the necessity of a statutory curb on the granting of military commissions to United States citizens became even more evident through the receipt by the President of a copy of the proceedings of the Legislature of South Carolina, transmitting a commission to the levy of armed forces by persons under for-

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eign authority. This report stated that five named citizens of South Carolina, and others unnamed, "have received and accepted military commissions from Mr. Genet * * * authorizing them and instructions requiring them, to raise, organize, train, and conduct troops within the United States * * * to proceed into the Spanish dominions; * * * that the persons above named in pursuance of the powers vested in them by the said commissions * * * have proceeded * * * to enroll numbers of citizens of this State * * * in the service of the Republic of France." The committee recommended that the governor issue a proclamation forbidding such acts; and also that the Attorney General prosecute such persons "for accepting or engaging to accept commissions from a foreign power to raise troops within the United States, and for going about within the States levying or attempting to levy troops, and for seducing and endeavoring to seduce the citizens of this State to enroll themselves for foreign service to commit acts of hostility against nations with whom the United States are at peace." (American State Papers, Foreign Relations, Vol. I, p. 309.)

A proposed message by the President to Congress, transmitting this report, was drafted by Hamilton, as follows:

* * * a case has occurred, which is conceived to render further forbearance inconsistent with the dignity, and perhaps the safety of the United States. It is proved, as will be seen by papers now transmitted for the information of Congress, that this foreign agent has proceeded to the extraordinary lengths of issuing commissions in the name of the French Republic, to several of our citizens, for the purpose of raising within the two Carolinas and Georgia a large military force, with the declared design of employing them, in concert with such Indians as could be engaged in the enterprise, in an expedition against the colonies in our neighborhood, of a nation with whom the United States are at peace.

It would seem likewise, from information contained in other papers, herewith also communicated, that a similar attempt has been going on in another quarter, namely, the State of Kentucky, though the fact is not yet ascertained with the requisite authenticity.

Proceedings so unwarrantable, so derogatory to the sovereignty of the United States, so dangerous in precedent and tendency, appear to render it improper that the person chargeable with them should longer continue to exercise the functions and enjoy the privileges of a diplomatic character.

Washington, however, simply forwarded the papers to Congress, January 15, 1794, with no comment.

Genet evasively admitted that he had granted commissions.¹

THE ACT OF 1794.

A bill drafted by Hamilton, and intended to penalize infractions of neutrality, was introduced in the Senate February 12, 1794. (Annals of Congress, 3d Cong., 1793-1795.) The very first section made it criminal to "accept or take any commission to serve a foreign prince or state in war." The second section made criminal the enlisting and hiring of others to enlist. The third section made criminal the fitting out and arming of privateers and the issue or delivery of a commission for any such ship. The fourth was concerned with the increase of the force of any foreign warships. The fifth made criminal any military expedition from the United States. These sections, practically unchanged, constitute the present so-called Neutrality Laws of the United States. (Federal Penal Code, secs. 9-13.) It will

¹ See as to this, a graphic letter from Fisher Ames (then Congressman from Massachusetts) to T. Dwight, Jan. 17, 1794. (Works of Fisher Ames, Vol. I, p. 132.)

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be noted that each section dealt with a particular problem and form of violation of neutrality with which the United States Government had been confronted between May, 1793, and February, 1794. The language used by Congress is to be construed, therefore, in connection with the evils to which it was intended to apply and with the events which gave rise to the statute. The bill passed the Senate March 13 by the casting vote of the Vice President, and was introduced in the House March 14. Before the House took action, however, the necessity became still clearer for the enactment of those sections penalizing the exercising of commissions to serve a foreign state, enlisting of men for foreign service, and sending out of military expeditions from the United States.

An expedition against New Orleans had been set on foot in Kentucky under French auspices, and foreign commissions were issued to United States citizens in the fall of 1793. Spain had complained to this country, and Jefferson wrote, November 6, to the governor of Kentucky (American State Paper, Foreign Relations, Vol. I, pp. 455-457):

I have received from the representatives of Spain here, information, of which the following is the substance: That on the 2d of October four Frenchmen, of the names of La Chaise, Charles Delpeau, Mathurin, and Gignoux, set out in the stage from Philadelphia to Kentucky; that they were authorized by the minister of France here to excite and engage as many as they could, whether of our citizens or others, on the road or within your Government, or anywhere else, to undertake an expedition against the Spanish settlements within our neighborhood, and, in event, to descend the Ohio and Mississippi and attack New Orleans, where they expected some naval cooperation; that they were furnished with money for these purposes, and with blank commissions, to be filled up at their discretion. I enclose you the description of these four persons in the very words in which it has been communicated to me.

Having laid this information before the President of the United States, I have it in charge from him to desire your particular attention to these persons, that they may not be permitted to excite within our territories, or carry from thence, any hostilities into the territory of Spain. For this purpose, it is more desirable that those peaceable means of coercion should be used which have been provided by the laws, such as the binding to the good behavior these or any other persons exciting or engaging in these unlawful enterprises, indicting them, or resorting to such other legal process as those learned in the laws of your State may desire. Where these fail, or are inadequate, a suppression by the militia of the State has been ordered and practised in the other States. I hope that the citizens of Kentucky will not be decoyed into any participation in these illegal enterprises against the peace of their country, by any effect they may expect from them on the navigation of the Mississippi.

The governor replied January 13, 1794, doubting whether there was any authority to restrain citizens, saying:

I have great doubts, even if they do attempt to carry their plan into execution (provided they manage their business with prudence), whether there is any legal authority to restrain or punish them, at least before they have actually accomplished it. For, if it is lawful for any one citizen of this State to leave it, it is equally so for any number of them to do it. It is also lawful for them to carry with them any quantity of provisions, arms, and ammunition; and, if the act is lawful in itself, there is nothing in the particular intention with which it is done that can possibly make it unlawful; which I know of no law which inflicts a punishment on intention, only, or any criterion by which to decide what would be sufficient evidence of that intention, if it was a proper subject of legal censure.

The new Secretary of State, Edmund Randolph, replied March 29, 1794, stating:

That foreigners should meddle in the affairs of a Government where they have no right to be, has scarcely even been tolerated, and is often severely punished. Foreigners should point the force of a nation, against its will, to objects of hostility, invasion of its dignity, its tranquillity, and even safety. Upon no principle should individuals on whom such guilt shall be fixed, bid the Government to wait,

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as your excellency would seem to suppose, until their numbers shall defy the ordinary animadversions of law; and until they are incapable of being subdued, but by the use of arms. To prevent the extremity of crimes, is wise and humane, and steps of caution have, therefore, been found in the laws of most societies.

Nor is this offense of foreigners expiated or lessened by an appeal to a presumed right in the citizens of Kentucky to enlist under such banners without the approbation of their country. In a government instituted for the happiness of the whole, with a clear delineation of the channels in which the authority derived from them must flow, can a part only of the citizens wrest the sword from the hands of those magistrates whom the whole have invested with the direction of the military power? They may, it is true, leave their country; they may take arms and provisions with them; but if these acts be done, not on the ground of mere personal liberty, but of being retained in a foreign service, for purposes of enmity against other people, satisfaction will be demanded, and the State to which they belong can not connive at their conduct without hazarding a rupture.

The division of opinion which had thus arisen between the governor and the Secretary of State as to legal authority to prevent these hostile actions caused the President to lay the whole correspondence before Congress, May 20, as evidence of the need of legislation. The House of Representatives responded by taking up Hamilton's bill for debate, May 31, June 2;¹ and the bill passed June 2 and became law June 5, 1794. Upon its passage, Hamilton wrote to Jay, June 4, 1794:

You will learn with satisfaction that the bill which had passed the Senate before you left, for punishing and preventing practices contrary to neutrality has become a law. I now consider the Executive and the judiciary as armed with adequate means for repressing the fitting out of privateers, the taking of commissions, or enlisting in foreign service, the unauthorized undertaking of military expeditions, etc.²

The wording of the first section of the statute (now Federal Penal Code, sec. 9) was probably derived and copied in part from an English statute of 1756 (29 George II, c. 17), which made it a felony for any British subject, without license, to "take or accept of any military commission, or otherwise enter into the military service of the French King as a commissioned or noncommissioned officer."

GENERAL PURPOSE OF THE ACT.

There has been but one reported indictment in the courts under this statute; in 1797, Isaac Williams, being tried in the district court in Connecticut for accepting a commission under the French Republic. (See 2 Cranch., 82, note, and Wharton's State Trials, p. 652.) At the time of the Canadian disturbances in 1838, however, Judge McLean, in a charge to the grand jury in the circuit court in Ohio, construed the law as follows:

The offense in the first section consists in "accepting and exercising a commission to carry on war against any people or State with whom we are at peace."

The word "commission" in the statute is used in the same sense as in Article II, section 2, of the Constitution granting the President power to appoint "officers of the United States * * * which shall be established by law" and "to fill up all vacancies * * * by granting commissions * * *"; and as in Article II, section 3, he "shall commission all the officers of the United States." The commission is the "deed of appointment" to office, "the open unequivocal

¹ See opposition of Monroe in the Senate and Madison in the House (Annals of Cong. 1793-1794, pp. 6757). As to the objects of this act of 1794, see Marshall, C. J., in *Santissima Trinidad*, 1 Brock. Rep. 66.
² In the debate in Congress on the renewal of the act of 1794 by the act of Mar. 2, 1797, there is a discussion of the law as to acceptance of commissions. [See Annals of Congress, 4th Cong., 2d sess., pp. 2228 et seq.]

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vocal act" by which the appointment is "evidenced." (See *Marbury v. Madison*, 1803—1 Cranch, 137, 157, 159.)

"Commission," in its legal sense, is used only in connection with an official office, and is not used in connection with mere employment or agency.

Thus Bouvier's Law Dictionary defines it as:

Letters patent granted by a government under the public seal to a person appointed to an office giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and as soon as it is signed and sealed vests the office in the appointee.

So, *Dew v. Judges* (1808—3 Hen. & Mun., 1, 43):

I take a commission to mean a warrant of office, a written authority or license issued by a person or persons, duly constituted by law for the purpose to a public officer empowering and authorizing him to execute the duties of the office to which he may be appointed.

United States v. Planter (1852—27 Fed. Cas., p. 546):

A commission grants the right to hold and discharge the duties of a certain office.

See also *Scofield v. Lounsbury* (1830—8 Conn., 109, 111).

Babbitt v. United States (1880—16 Ct. Cls., 202, 215).

English dictionaries in use about the time of the enactment of the statute in 1794 define "commission" as follows:

Kersey's English Dictionary (1721):

Commission: A warrant for an office. In military affairs, the authority by which every officer acts in his post.

Fenning (1771):

Commission: * * * A warrant for the exercise of any office.

Dyche (1794):

Commission: * * * A warrant by which any trust is held, or an office is constituted.

Scott (1797):

Commission: * * * A warrant of office.

Johnson's New English Dictionary (1755 Ed.):

Walker (1791) and *Sheridan* (1797):

Commission: * * * A warrant by which any trust is held; a warrant by which a military officer is constituted.

From the definitions *supra*, the history of the statute, the particular evils against which it was directed, as well as from the English act from which it was apparently taken, the meaning of the words "accept or exercise a commission to serve a foreign prince * * * in war by land or sea" becomes entirely plain. By the word "commission," Congress intended the official warrant by which a military, naval, or other Government officer is appointed to the rank, command, post, or office held by him under a foreign Government, either of a body of men or of a privateer or other ship of war, or otherwise—delegated, or intrusted to him. It had no reference to a contract, or agreement of employment by a foreign Government.

Respectfully submitted.

CHARLES WARREN,
Assistant Attorney General.

OCTOBER, 1915.

Sec. 6—Rights of Members

Cl. 1—Compensation, Privileges

the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.⁸

SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the the United States, shall be a Member of either House during his Continuance in Office.

COMPENSATION, IMMUNITIES AND DISABILITIES OF MEMBERS

When the Pay Starts

A Member of Congress who receives his certificate of admission, and is seated, allowed to vote, and serve on committees, is *prima facie* entitled to the seat and salary, even though the House subsequently

⁸ *Field v. Clark*, 143 U.S. 649 (1892); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); see also *Coleman v. Miller*, 307 U.S. 433 (1939).

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declares his seat vacant. The one who contested the election and was subsequently chosen to fill the vacancy is entitled to salary only from the time the compensation of such "predecessor" has ceased.¹

Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.² It does not apply to service of process in either civil³ or criminal cases.⁴ Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.⁵

Privilege of Speech or Debate

Members.—This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."⁶ So Justice Harlan explained the significance of the speech and debate clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689⁷ and the history of which traces back almost to the beginning of the development of Parliament as an independent force.⁸ "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."⁹ "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."¹⁰

¹ *Pape v. United States*, 127 U.S. 67 (1888).

² *Long v. Ansell*, 293 U.S. 76 (1934).

³ *Id.*, 83.

⁴ *United States v. Cooper*, 4 Dall. (4 U.S.) 341 (C.C. Pa. 1800).

⁵ *Williamson v. United States*, 207 U.S. 425, 446 (1908).

⁶ *United States v. Johnson*, 383 U.S. 169, 178 (1966).

⁷ "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

⁸ *United States v. Johnson*, 383 U.S. 169, 177-179, 180-183 (1966); *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

⁹ *United States v. Johnson*, 383 U.S. 169, 178 (1966).

¹⁰ *United States v. Brewster*, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from *Coffin v. Coffin*, 4 Mass. 1, 28 (1808), in *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

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The protection of this clause is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are things generally done in a session of the House by one of its members in relation to the business before it."¹¹ Immunity from civil suit, both in law and equity, and from criminal action based on the performance of legislative duties has been enforced by the Court. In *Kilbourn v. Thompson*,¹² Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court determined that the contempt was wrongly voted.¹³ In *Dombrowski v. Eastland*,¹⁴ the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiffs. *Kilbourn* was relied on in *Powell v. McCormack*,¹⁵ in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House.¹⁶

Application of a general criminal statute to call into question the legislative conduct and motivation of a Member was voided in *United States v. Johnson*.¹⁷ The Member had been convicted for conspiring to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at trial. It was this examination

¹¹ *Powell v. McCormack*, 395 U.S. 486, 502 (1969), quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

¹² 103 U.S. 168 (1881).

¹³ *Id.*, 200-205. But see *Gravel v. United States*, 408 U.S. 606, 618-619 (1972).

¹⁴ 387 U.S. 82 (1967).

¹⁵ 395 U.S. 486 (1969).

¹⁶ *Id.*, 501-506. Because the Court found the presence as defendants of certain congressional employees sufficient to enable it to review Powell's exclusion, the case was litigated. But Chief Justice Warren cautioned: "Given our disposition of this issue, we need not decide whether under the Speech and Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." *Id.*, 506 n. 26. The Court in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), had also reserved the question whether there might be circumstances in which "there may . . . be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible."

¹⁷ 383 U.S. 169 (1966).

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into the context of the speech—its authorship, motivation, and content—which the Court found foreclosed by the speech or debate clauses.¹⁸

Thus, so long as legislators are "acting in the sphere of legitimate legislative activity,"¹⁹ it appears that they are "protected not only from the consequence of litigation's results but also from the burden of defending themselves."²⁰ But the scope of the meaning of "legislative activity" has its limits. "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."²¹ The Clause would not, therefore, confer immunity from civil or criminal liability for wrongful conduct which is accomplished prior to the entering into or protected legislative activity nor for wrongful conduct occurring subsequent to the performance of protected legislative activity. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."²² The *Gravel* case specifically held that a grand jury could inquire into the processes by which the Member obtained classified Government docu-

¹⁸ *Id.*, 180, 184–185. The Court cautioned that "without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Id.*, 185. This question was similarly reserved in *United States v. Brewster*, 408 U.S. 501, 529 n. 18 (1972), although Justice Brennan for himself and Justice Douglas reached and answered negatively that question. *Id.*, 529, 540.

¹⁹ *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (holding a state legislator immune from suit under the federal civil rights law granting a damage remedy for violation of one's civil rights).

²⁰ *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Powell v. McCormack*, 395 U.S. 486, 505 (1969). "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

²¹ *Gravel v. United States*, 408 U.S. 606, 625 (1972).

²² *Id.*, 626.

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ments and that it could inquire into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct.²³

However, in *United States v. Brewster*,²⁴ while continuing to assert that the clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch,"²⁵ the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member of Congress which charged that he accepted a bribe to be "influenced in his performance of official acts in respect to his action, vote, and decision" on legislation pending before his committee, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch."²⁶ In other words, it is the fact of having taken a bribe, not the act which the bribe is intended to influence, which is the subject of the prosecution and the speech or debate clause interposes no obstacle to this type of prosecution.

Congressional Employees.—Until the most recent decision, it was seemingly the basis of the decisions that while Members of Congress may be immune from suit arising out of their legislative activities, legislative employees who participate in the same activities under the direction of the Member or otherwise are responsible for their acts if those acts be wrongful.²⁷ Thus, in *Kilbourn v. Thompson*,²⁸ the ser-

²³ Id., 613-627.

²⁴ 408 U.S. 501 (1972).

²⁵ Id., 516.

²⁶ Id., 526.

²⁷ Language in some of the Court's earlier opinions had indicated that the privilege "is less absolute, although applicable," when a legislative aide is sued, without elaboration of what was meant. *Dombrowski v. Eastland*, 387 U.S. 82, 81 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). In *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), the Court had imposed substantial obstacles to the possibility of recovery in appropriate situations by holding that a federal cause of action was lacking and remitting litigants to state courts and state law grounds. The

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geant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski v. Eastland* ⁴ held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And in *Powell v. McCormack*, ⁵ The Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the federal courts jurisdiction to review the propriety of the plaintiff's exclusion from office by vote of the House. Upon full consideration of the question, however, the Court in *Gravel v. United States* ⁶ accepted a series of contentions urged upon it not only by the individual Senator but by the Senate itself appearing by counsel as *amicus*: "that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate clause . . . will inevitably be diminished and frustrated." ⁷ Therefore, the Court held "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." ⁸

The *Gravel* holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court says, the legislators in *Kilbourn* were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention—was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it. ⁹ *Dombrowski* was interpreted as having held that no evidence implicated the Senator involved, whereas the committee counsel had been accused of "conspiring to violate the constitutional rights of private parties. Unlawful

case is probably no longer viable, however, after *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971).

³ 103 U.S. 168 (1881).

⁴ 387 U.S. 82 (1967).

⁵ 395 U.S. 486 (1969).

⁶ 408 U.S. 606 (1972).

⁷ *Id.*, 616-617.

⁸ *Id.*, 618.

⁹ *Id.*, 618-619.

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conduct of this kind the Speech or Debate Clause simply did not immunize.”¹⁰ And *Powell* was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. “None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. . . . [N]o prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.”¹¹

Appointment to Executive Office

“The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only ‘during the time, for which he was elected;’ thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.”¹ As might be expected, there is no judicial interpretation of the language of the clause and indeed it has seldom surfaced as an issue.

In 1909, after having increased the salary of the Secretary of State,² Congress reduced it to the former figure so that a Member of

¹⁰ Id., 619–620.

¹¹ Id., 620–621. The availability of congressional employees as defendants whom plaintiffs may sue to obtain declaratory and injunctive relief in contesting nonstatutory congressional action remains a problem. Compare *Stamler v. Willis*, 415 F. 2d 1365 (C.A. 7, 1969), cert. den., 399 U.S. 929 (1970) (constitutionality of resolution creating House committee may be challenged in declaratory action against committee employees), and *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.C.D.C. 1970) (certain congressional employees may be restrained from publishing committee report which allegedly defames plaintiffs), with *Doe v. McMillan*, 459 F. 2d 1304 (C.A.D.C. 1972) (suit against congressional employees to restrain publication of committee report is really against Congress and cannot be maintained).

¹² J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 864.

¹³ 34 Stat. 948 (1907).

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particular point in the proceedings. Similar reasoning underlay the holding in *Helstoski v. Mcanor*, 442 U.S. 500 (1979), that an indicted Member, whose motion to dismiss the indictment as barred by the speech or debate clause is denied, could immediately appeal the denial rather than await conviction and appeal.

[P. 122, following N. 11 in text, add:]

In the course of holding that a Member of Congress may be sued directly under the Fifth Amendment's due process clause for alleged gender discrimination, the Court said that *only* the speech or debate clause could shield an employment decision of a Member from judicial review.^{1,5} Because the clause itself embodies the concerns of the separation of powers doctrine for the preservation of the independence of coequal branches of government, with respect to the legislative branch, no other constitutional provisions or implications from constitutional structure would preclude adjudication and decision of the validity of such a decision by the Member.^{2,5} The critical importance of the clause and its interpretation to Members of Congress is thus greatly heightened.

Reflecting a general understanding of the limits of the clause, the Court in *Hutchinson v. Proxmire*^{3,5} held that republication of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases, was not protected. The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with

^{1,5} *Davis v. Passman*, 442 U.S. 228, 235 n. 11 (1979). While the panel decision below, *id.*, 544 F. 2d 865, 877-881 (C.A. 5, 1977), had denied speech or debate protection, the full court reversal on other grounds, *id.*, 571 F. 2d 793 (C.A. 5, 1978) (*en banc*), had resulted in no decision on that question. The Supreme Court specifically intimated no view and the issue would have been considered on remand but for a settlement between the parties.

^{2,5} Three of the four dissenters argued that the separation of powers doctrine precluded judicial review. *Davis v. Passman*, 442 U.S. 228, 249, 261 (Chief Justice Burger and Justices Powell and Rehnquist). But see *Hutchinson v. Proxmire*, 443 U.S. 111, 125 (1979) (opinion for Court by Chief Justice Burger) (alluding to "very purpose" of Constitution "to provide *written* definitions of the powers, privileges, and immunities granted rather than rely on evolving constitutional concepts. . . .") In other contexts, i.e., the Presidency, the Court has provided substantive content to separation of powers concepts. E.g., *United States v. Nixon*, 418 U.S. 683, 703-713 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-446 (1977), and *id.*, 504, 505-520 (Chief Justice Burger dissenting), 545 (Justice Rehnquist dissenting). In *United States v. Myers*, 635 F. 2d 932 (C.A. 2, 1980), the court treated separately claims of speech or debate immunity and separation of powers barriers to investigation and prosecution of a Member.

^{3,5} 443 U.S. 111, 123-133 (1979).

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respect to other matters which the Constitution places within the jurisdiction of either House."^{4.5} Press releases and newsletters are "[v]aluable and desirable" in "inform[ing] the public and other Members" but neither are essential to the deliberations of the legislative body nor part of the deliberative process.^{5.5}

More problematic and within the trend evident in *Gravel* and *Brewster* is the decision in *Doe v. McMillan*.^{6.5} in effect limiting the protection of the speech or debate clause through an inquiry into the nature of the "legislative acts" performed by Members and staff personnel. A Committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report which the House of Representatives had routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner and their parents sued various Committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the speech or debate clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity, either under the speech or debate clause or under the common law doctrine of official immunity, than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and other acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.^{7.5}

^{4.5} Id., 126, quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972) (emphasis omitted).

^{5.5} *Hutchinson v. Proxmire*, 441 U.S. 111, 130, 132-133 (1979). The Court distinguished between the more important "informing" function of Congress, i.e., its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function, i.e., its efforts to inform the public about its activities. It was the latter function the Court did not find an integral part of the legislative process. See also *Doe v. McMillan*, 412 U.S. 306, 314-317 (1973). For similar analysis in a complex case in which dissemination of seized documents and conduct allegedly violating the Fourth Amendment were found unprotected, see *McSurely v. McClellan*, 553 F.2d 1277 (C.A.D.C. 1976) (*en banc*), cert. dismd. as improvidently granted *sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978).

^{6.5} 412 U.S. 306 (1973).

^{7.5} Id., 324.

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Difficulty attends an assessment of the effect of the decision, inasmuch as the Justices in the majority adopted mutually inconsistent stands^{8.5} and there were four dissenters who believed the acts complained of were wholly protected.^{9.5} The case also leaves very much in doubt the propriety of injunctive relief to restrain publication or other actions of Congress.^{10.5}

In *Eastland v. United States Servicemen's Fund*,^{11.5} however, the Court held that the clause precluded suit against the Chairman and Members of a Senate Subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress' power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the Subcommittee's actions prior to the possible institution of contempt actions in the courts. While the ruling would wholly preclude the object of an investigation from resisting the obtaining of records and information concerning him that were in the possession of third parties, the Court considered this interpretation required by the clause.^{12.5}

^{8.5} Justices Douglas, Brennan, and Marshall, while joining the opinion of the Court, also joined in a separate opinion, which, contrary to the opinion of the Court, accepted the informing of the public as a legislative act but denied immunity in any event because in their view a legislative act that infringes upon the constitutional rights of citizens is subject to judicial review and remedial action in the federal courts. *Id.*, 325. Compare *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979) (Justice Brennan dissenting).

^{9.5} Justices Rehnquist, Stewart, Blackmun, and Chief Justice Burger would have held all the legislative parties immune under the speech or debate clause, on the basis that all the actions complained of had been specifically authorized by the House. *Doc v. McMillan*, 412 U.S. 306, 331, 332, 338 (1973) (dissenting). For these Justices, the question of authorization apparently would be the distinguishing factor in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). But compare *id.*, 133 and n. 11 (congressional provision of frank for dissemination cannot expand scope of clause).

^{10.5} Justice Douglas' concurrence states without elaboration that the plaintiffs "are entitled to relief." *Doc v. McMillan*, 412 U.S. 306, 330 (1973) (concurring). Three of the dissenters argued that the principle of separation of powers forbade a court to grant the requested injunctive relief. *Id.*, 343-345. Compare *Davis v. Passman*, 442 U.S. 228, 245, 246 n. 24 (1979), with *id.*, 412 U.S., 249, 250-251 (Chief Justice Burger dissenting).

^{11.5} 421 U.S. 491 (1975).

^{12.5} "We reaffirm that once it is determined that Members are acting within the 'legitimate' legislative sphere the Speech or Debate Clause is an absolute bar to interference." *Id.*, 503. Concurring, Justices Marshall, Brennan, and Stewart suggested without elaboration upon proper parties and procedures that a person who could not challenge the subpoena before the committee because it was not directed to him but to a third party might nonetheless be able in some circumstances to obtain judicial review. *Id.*, 513. For one possible approach, see e.g., *United States v. American Telephone & Telegraph Co.*, 419 F. Supp. 454 (D.C.D.C. 1976), *vacated and remanded*, 551 F. 2d 384 (C.A.D.C. 1976), *further opinion*, 567 F. 2d 121 (C.A.D.C. 1977); *Ashland Oil Co. v. FTC*, 548 F. 2d 977 (C.A.D.C. 1976).